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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TESLA, INC. SECURITIES LITIGATION

Case No.: 3:18-cv-04865-EMC

DEFENDANTS' OPPOSITION TO LEAD PLAINTIFF'S MOTION TO LIFT THE DISCOVERY STAY TO ISSUE NON-PARTY SUBPOENAS

Date: January 24, 2019
Time: 1:30 p.m.
Dept.: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

Date Action Filed: August 10, 2018

Defendants Tesla, Inc. ("Tesla") and Elon Musk (collectively, "defendants"), respectfully submit this opposition to Lead Plaintiff's ("plaintiff") motion to lift the discovery stay to issue five non-party subpoenas. *See* Dkt. No. 167. Plaintiff's motion is both procedurally and substantively flawed.

The motion is procedurally flawed because it was filed in contravention of the Court's Standing Order on Discovery. The Standing Order is designed to streamline or eliminate discovery issues, and expressly provides that "no motions regarding discovery disputes may be filed without prior leave of the Court." Plaintiff did not seek or obtain such leave. Instead, and despite a prompt request that plaintiff abide by the Standing Order, plaintiff insisted on going forward, forcing defendants to prepare this opposition, potentially needlessly, instead of following the informal procedures envisioned by the Standing Order. This alone justifies denial of the motion.

The motion is substantively flawed because it fails to show that any "exceptional circumstances" justify circumventing the mandatory stay of discovery imposed by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Instead, plaintiff rests entirely on insufficient, speculative argument that, if accepted, would permit preservation subpoenas to be issued as a matter of course in every securities class action, precisely the opposite of what the PSLRA requires. Indeed, plaintiff has not even bothered to contact any of the third parties to ascertain whether they have any relevant evidence, much less offer any basis for suggesting that it may not be preserved.

Moreover, by targeting Mr. Musk's girlfriend at the time (who has never worked for Tesla) and, according to published reports, a "rapper" who, based on the articles plaintiff has submitted, has a "history of making bold and sometimes unverified claims," is a "veteran of long and nonsensical beefs [and has] feuded with everyone from Sarah Palin to Nick Cannon," and has been "banned" from Twitter (*see* Pl. Exs. A, B), it is readily apparent that this is more of an effort to sensationalize these proceedings than a serious, legitimate effort to preserve "electronic documents" of third parties with first-hand knowledge of important facts. In any event, because there is no evidence that any of the proposed subpoena recipients will imminently discard any

relevant evidence, which is the showing that the law requires, plaintiff's motion should be denied.

I. The Motion Was Filed Without Leave Of Court In Violation Of The Standing Order

Plaintiff filed this motion on December 12 without informing defendants of his desire to seek relief from the PSLRA's mandatory discovery stay and without obtaining prior leave of Court. This violates Paragraph 4 of the Court's Standing Order. Accordingly, defendants brought the Standing Order to plaintiff's attention on December 13, requesting that plaintiff meet and confer and, failing any agreement, that the parties submit the joint three-page letter to the Court outlining the dispute as per the Standing Order. Declaration of Dean S. Kristy ("Kristy Decl."), Ex. 1. In that way, the Court could then determine "if additional briefing or a telephonic conference will be necessary." Standing Order ¶ 4.

Plaintiff refused, insisting that, because the proposed subpoenas targeted third parties, there was no obligation under the Standing Order and no burden imposed on defendants. *See* Kristy Decl., Ex. 2. Courts across the country, however, recognize that defendants have a legitimate interest in the PSLRA's mandatory discovery stay, and have standing to assail "preservation subpoenas" of this exact sort. *See, e.g.*, *In re Cree, Inc. Sec. Litig.*, 220 F.R.D. 443, 446 (M.D.N.C. 2004) ("Given the intent of the stay provision and its application to all types of discovery, Defendants have standing to challenge Plaintiffs' [preservation] subpoenas"); *see In re Fluor Corp. Sec. Litig.*, 1999 WL 817206, at *2-3 (C.D. Cal. Jan. 15, 1999) (denying plaintiffs' motion to serve preservation subpoenas in light of defendants' objections); *In re Heckmann Corp. Sec. Litig.*, 2011 WL 10636718, at *3-6 (D. Del. Feb. 28, 2011) (denying leave to serve preservation subpoenas); *Sapssov v. Health Mgmt. Assocs., Inc.*, 2013 WL 12153530, at *1-2 (M.D. Fla. May 7, 2013) (accepting defense arguments and denying leave to serve preservation subpoenas). In any event, the point here is that the Standing Order *expressly provides* that "no motions" regarding discovery may be filed without prior leave of Court. Those words have meaning. This alone justifies the denial of this motion.

II. Plaintiff Failed To Show The Exceptional Circumstances The PSLRA Requires

This suit is subject to the PSLRA, which provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds

upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B). As with any discovery, modifying the mandatory stay to serve preservation subpoenas requires a showing of exceptional circumstances. *See Fluor*, 1999 WL 817206, at *1-3 (denying motion to issue preservation subpoenas because "exceptional circumstances" not present); *see also Faulkner v. Verizon Commc'ns, Inc.*, 156 F. Supp. 2d 384, 402 (S.D.N.Y. 2001) ("The sole example proffered by Congress as to what justifies lifting the [PSLRA] stay is the 'the terminal illness of an important witness,' which might 'necessitate the deposition of the witness prior to ruling on the motion to dismiss'"). Indeed, in virtually every securities class action, at least some relevant information is in the possession of third parties, yet the issuance of preservation subpoenas is the exception, not the rule, because exceptional circumstances are rarely present.

Where, as here, the putative justification for the subpoenas is concern that information will be lost or discarded, plaintiff must not only establish that the information is relevant, but show preservation is "necessary … to save evidence from imminent destruction." *Heckmann*, 2011 WL 10636718, at *3. This requires an evidentiary showing that there is a *real threat* that important information will be lost and merely asserting "that issuing preservation subpoenas is necessary because loss or destruction of evidence is possible," due to document retention policies or other reasons, is insufficient. *Id.* at *5. In fact, "generalizations of fading memories and allegations of possible loss or destruction" are routinely rejected. *See Fluor*, 1999 WL 817206, at *3. Plaintiff must show that there is a real "prospect" that existing information, even in the hands of "crucial actors," will not be retained in the period between now and resolution of a motion to dismiss. *See Asset Value Fund Ltd. Partnership v. FIND/SVP, Inc.*, 1997 WL 588885, at *1 (S.D.N.Y. Sept. 19, 1997) (denying preservation motion); *Sapssov*, 2013 WL 12153530, at *2 (denying motion in absence of affidavits or other proof sufficient to meet standard). Importantly, "'wholly speculative assertions as to the risk of lost evidence and undue prejudice' will not satisfy the standard." *Cree*, 220 F.R.D. at 447.

Plaintiff does not come close to meeting this standard. He just ignores it altogether, never once mentioning it in his motion. Putting aside his rather transparent motive (discussed below),

his entire basis for seeking to serve subpoenas is premised on a wholly speculative lawyer argument that non-parties "***might*** otherwise discard, destroy, or misplace" unspecified evidence in "electronic form, *e.g.*, Twitter or Instagram messaging," which plaintiff asserts (without any basis whatsoever) is "inherently fluid and therefore prone to being discarded inadvertently." Mot. at 1 (emphasis added); *see* Mot. at 4 (nakedly claiming that "evidence is increasingly in danger of disappearing unless Plaintiff is allowed to issue preservation subpoenas"). But there is no basis for concluding that Twitter or Instagram messages are more likely to disappear than any other document type, so the underlying premise of the motion is simply illusory. These are precisely the type of speculative assertions that courts repeatedly reject as a basis for end-running the discovery stay. *See Heckmann*, 2011 WL 10636718, at *4 ("The loss or destruction of evidence must be imminent, as opposed to being hypothetically possible or merely speculative"). Indeed, plaintiffs did not bother to contact any of the five non-parties it intends to subpoena to find out if they even have any relevant information, much less provide a reasonable basis for suggesting that such evidence will not be retained prior to resolution of a motion to dismiss. *See id.* at *5 (noting that plaintiff failed to show why sending preservation letters to third parties would be insufficient).

Moreover, given the alleged "relevance" of each of the third parties, it is evident that this is really more of an effort to sensationalize these proceedings than a legitimate attempt to preserve evidence. Indeed, ***none of the third parties ever worked for Tesla or Mr. Musk, or is alleged to have had any involvement in his tweets or in his evaluation of a potential go-private transaction***. Instead, plaintiff focuses on Claire Elise Boucher (a musician known as Grimes), who was Mr. Musk's girlfriend at the time. Based on a *New York Times* article stating that Mr. Musk "woke up at home with his girlfriend … and had an early workout" on the day of his first go-private tweet on August 7, 2018 (which the article said he wrote as he "drove himself to the airport") (Pl. Ex. C at 2), plaintiff speculates that she "likely observed [his] behavior or overheard conversations" over the ensuing days and "[i]t is also likely that Ms. Boucher, as Musk's girlfriend, discussed the tweet and/or the fallout caused by it with Musk shortly after it was sent." Mot. at 3. Putting aside such rank speculation – indeed, every defendant in every securities class action has a spouse, significant other and friends, but that does not justify discovery of them –

there is nothing in plaintiff's recitation that even remotely suggests that Ms. Boucher has ***ever had relevant documents,*** much less that their destruction is imminent. That is a far cry from the required showing of exceptional circumstances; if anything, given Ms. Boucher's lack of involvement in any contemplated transaction, it would merit a protective order under Rule 26(c)(1) even if this case ever gets to discovery.[1]

The same is true as to Ms. Azealia Banks, a rapper who, according to plaintiff's articles, is a former friend of Ms. Boucher. Those same articles state that she is a "veteran of long and nonsensical beefs [having] feuded with everyone from Sarah Palin to Nick Cannon"; she "remains a Twitter villain even after being banned from the service"; she went on a rant on Instagram "that began as a delirious critique of colonial wealth and racial privilege, [and] became a vaguely eugenicist denigration of Musk as a caveman"; and she "has a history of making bold and sometimes unverified claims," including against Beyonce, MonetX (a rival) and Russell Crowe. Pl. Exs. A, B. Published reports also indicate that Ms. Banks apparently claims to have offered Twitter's CEO a form of "protection" from ISIS. *See* Kristy Decl., Ex. 3. Despite reports that completely undermine her credibility, plaintiff calls her a "key source of information in this matter" – which if anything underscores how weak plaintiff's case is – based entirely on her claim that she was present in Mr. Musk's home to visit Ms. Boucher from August 10-12 (well after the August 7 tweets) and supposedly observed Mr. Musk, even though he flatly denies ever meeting her. According to plaintiff, she "likely observed relevant events in addition to those" Ms. Banks "described in the media." Mot. at 3. Putting aside Ms. Banks' history and her lack of first-hand information that is even arguably relevant, plaintiff has submitted no evidence supporting claims that she has relevant documents (in electronic or any other form) or that there is any risk that any such information will not be retained. This is simply not the type of witness, or

[1] Plaintiff's reliance on *In re Tyco Int'l, Ltd. Sec. Litig.*, 2000 WL 33654141 (D. N.H. July 27, 2000) is entirely misplaced. There, the court found exceptional circumstances were present to justify preservation subpoenas based on a detailed affidavit explaining the non-parties' preservation policies and how relevant documents were at risk. No such affidavit has been submitted here. Plaintiff's other cases, *Neibert v. Monarch Dental Corp.*, 1999 WL 33290643 (N.D. Tex. Oct. 22, 1999) and *Vezzetti v. Remec, Inc.*, 2001 WL 37118900 (S.D. Cal. July 23, 2001) failed to address or apply the exceptional circumstances test, and in any event did not involve non-percipient witnesses such as those here.

factual record, that could justify the required finding of exceptional circumstances necessary to obtain relief from the mandatory discovery stay.

Two of the other third parties, the *Business Insider* and *Gizmodo*, are included simply because they published the stories about the claims made by Ms. Banks on August 13, 2018 (Pl. Exs. A, B). Plaintiff makes no claim that these entities have or are about to discard relevant documents; indeed, plaintiff does not even claim that these entities use "Twitter or Instagram messaging" that is supposedly at risk of being purged. Nor does plaintiff even purport to explain what document preservation policies these entities employ. Hence, there is no basis offered for serving preservation subpoenas on these media outlets.

Similarly, the fact that the *New York Times* published an article on August 16, 2018 following an interview with Mr. Musk (Pl. Ex. C) on a range of topics, including his extensive pre-tweet contacts with the Saudi Arabia sovereign wealth fund about a potential go-private transaction, does not merit relief from the stay. Plaintiffs make no showing that the *New York Times* has information beyond what is set forth in its article, much less that such information is at risk of being discarded. It is hardly unusual for the financial and mainstream press to report on relevant events, but that has never been a basis for circumventing the PSLRA stay. Indeed, as with the other media outlets, the entire basis for plaintiff's motion – that Twitter or Instagram messages may be "lost" – has no apparent application to the *New York Times.*

Finally, plaintiff makes no real effort to show "undue prejudice" if leave to issue these subpoenas is denied, offering only a one-sentence throwaway assertion that if documents are lost or destroyed, "it would be unlikely that Plaintiff could ever establish all facts contained in the documents." Mot. at 5. But since plaintiff's motion purports to rely on published stories, it is hardly evident why that is the case. In any event, such an argument can be made *in every* securities class action before a motion to dismiss is resolved. As the cases hold, "the inherent delay in the PSLRA's discovery stay that compels "the plaintiff to wait until its complaint has been legally tested before it can conduct discovery is not *unduly* prejudicial." *Heckmann*, 2011 WL 10636718, at *4 (emphasis in original; internal quotation omitted). *See In re Celera Corp. Sec. Litig.*, 2014 WL 3827570, at *2 (N.D. Cal. Feb. 25, 2014) ("Prejudice caused by the delay

inherent in the PSLRA's discovery stay cannot be 'undue' prejudice because it is prejudice which is neither improper nor unfair").[2]

Dated: January 3, 2019

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[2] The proposed subpoenas are also not sufficiently particularized, as they fail to "identify the *specific types* of evidence that fall within its scope." This requires a "clearly defined universe of documents," rather than a string of requests and an obligation to preserve "all documents." *Heckmann*, 2011 WL 10636718, at *4. Despite predicating his motion on a concern about Twitter and Instagram messaging, the subpoenas here are overly broad and all-encompassing, going to all documents in whatever form. *Id.*